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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 378

UNIVERSAL EQUIPMENT COMPANY, A DELAWARE CORPORATION,

Petitioner,

vs.

HARVEY CORPORATION, A FLORIDA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on April 27, 1951, rehearing denied July 11, 1951.

Opinions Below

The first opinion of the Supreme Court of Florida is reported in 29 So. (2d) 700, dated March 28, 1947. The second opinion is reported in 42 So. (2d) 577, dated September 23, 1949. The third and last is a memorandum opinion (R—88-90), which is unreported. This opinion was based upon an appeal taken from the final decree of the Circuit Court of Dade County, which is unreported (R—76-83).

The Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

The Stage at Which Federal Questions Were Raised

The Federal questions were first raised by the appeal to the Supreme Court of Florida from the above decree and by the assignments of errors which challenged the correctness of the decree and also by petitions for rehearing in the Supreme Court of Florida (R—67, 92).

Questions Presented

Whether:

(a) A judgment entered by a state court without notice and an opportunity to be heard is violative of procedural due process guaranteed by the Fourteenth Amendment; and

(b) A case arbitrarily and capriciously decided in violation of settled principles and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, is in violation of the due process clause.

Statement

A tenant sued his landlord in an equity proceeding to recover the possession of real estate, together with damages for the detention, past, present, and prospective (R—1-13). The Circuit Court for Dade County determined that the detention period extended from July 28, 1944, to February 5, 1945, and awarded as damages for this period the sum of $25,240.12. The Supreme Court of Florida reversed, holding that the wrong measure of damages was employed (29 So. (2d) 700, dated March 28, 1947). Pursuant to the Supreme Court's mandate the Circuit Court of Dade

County entered another decree in which it recited that the tenant had refused to offer any further evidence of damages and therefore no damages would be allowed since there was no basis in the record. The Supreme Court of Florida reversed, holding that the detention period expired on February 5, 1945, that based upon evidence in the record, the value of the leasehold estate to April 1, 1945, was $52,800, and directed the entry of a judgment for this sum, less $22,800, the assumed amount of the rent up to February 5, 1945. This amount the Supreme Court of Florida said was $29,700, although the subtraction is obviously incorrect. Upon receipt of the mandate by the Circuit Court of Dade County on this last opinion, it proceeded to enter two judgments against the petitioner here, as follows:

1. A judgment for $29,600, with interest from February 5, 1945, a total of $38,716.80, for which execution was awarded.

2. A judgment for $6,855.52, with interest from February 5, 1945, a total of $8,967.02, for which execution was awarded.

The Supreme Court, by a memorandum decision dated April 27, 1951, affirmed this decree (R—88-90) with one Justice dissenting. The dissenting Justice held that judgment No. 2 was entered without authority of law. A petition for rehearing (R—92) challenged the validity of both judgments on Federal Constitutional grounds. The petition was denied.

Specification of Errors to Be Urged

The Supreme Court of Florida erred:

1. In holding that the petitioner was liable for damages beyond the admitted and adjudicated date of the detention period as fixed by both the Circuit Court of Dade County and the Supreme Court of Florida.

2. In holding that judgment No. 2, which was entered without notice or an opportunity to be heard, was a valid judgment.

3. In affirming the order of the Circuit Court.

Reasons for Granting the Writ

1. The decision below as to the judgment for $29,600 was entered by the Supreme Court of Florida after the Circuit Court of Dade County had decided as a matter of fact and law that the plaintiff below had failed to prove any damages. The Supreme Court of Florida arbitrarily and capriciously, upon the same record, decided that the damages were $29,700, but in doing so, used as a basis for the measurement of damages the alleged value of the leasehold estate which was the subject of the suit and extended that value to April 1, 1945, some 56 days beyond the detention period as previously established both by the Circuit and Supreme Courts. The property involved in the case was a Miami Beach hotel, the income of which was largely, if not wholly, obtained in the season between January 1st and March 31st, so that the extension of the detention period to March 31st included that portion of time when the hotel's income was the greatest. Actually, the difference between the value of the leasehold estate as of February 5, 1945, and as of March 31, 1945, was a considerable sum of money, for which period the Supreme Court of Florida undertook without hearing to enter judgment against the petitioner, notwithstanding its determination that the detention period expired on February 5, 1945.

As a matter of fact, the record shows that the plaintiff below (respondent here) was in possession of the hotel from February 5, 1945, and therefore, that the petitioner could not have been responsible for damages for the detention after that date. Both Courts and all counsel agree

that possession was awarded on February 5, 1945. Hence, the imposition of damages beyond that date was arbitrary and capricious and was made in plain violation of the rules set forth in *Postal Telegraph Cable Company* v. *Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215, dated June 10, 1918; *Williams* v. *Tooke,* 108 Fed. (2d) 758 (5th Cir. 1940).

As to judgment No. 2 for $6,855.52 which, together with interest, amounts to $8,967.02, there was plainly no authority in law for the entry of this judgment, as one of the Justices of the Supreme Court so held in a dissenting opinion. When the case had last been in the Supreme Court of Florida, it was reversed with directions to enter a judgment in favor of the plaintiff below for $29,700. The lower Court not only entered a judgment for this amount, but, without trial, entered also a judgment for $6,855.52, with interest from Febrauary 5, 1945. As to the entry of this judgment, the petitioner had neither a hearing nor an opportunity to be heard at any time. The petitioner was therefore deprived of its rights under the Fourteenth Amendment. *Dartmouth College* v. *Woodward,* 4 Wheaton 518, 4 L. Ed. 629 (1819).

Argument

The total amount which was awarded as damages against the petitioner by the last judgment of the Circuit Court of Dade County is pretty close to $50,000. It is mathematically demonstrable that the petitioner has been excessively mulcted in damages by this judgment in a sum over $28,000, a not inconsiderable amount.

The controversy here arose because the United States Army took possession of a hotel on Miami Beach which belonged to the petitioner and which had been leased to the respondent. The hotel was surrendered by the Army to the petitioner in July, 1944. Petitioner commenced

making repairs to restore the hotel to the condition that obtained prior to the Army's occupation. Then the respondent became involved in the controversy with the petitioner as to whether or not the petitioner intended to return the hotel to the respondent when the repairs were made. Regardless of whether the respondent's wrongs were real or imaginary, it applied to the Circuit Court for relief by a bill in chancery in which a receiver was appointed to the hotel. The receiver stayed in possession until February 5, 1945, at which time he surrendered possession of the hotel to the respondent with every room in the house occupied. The Circuit Court then determined that the detention period had extended from July 28, 1944, to February 5, 1945. Obviously, in the warm summer months and for the latter part of the year before the beginning of the winter season in Florida where there was no real patronage for the hotel. Actually, the hotel was in possession of the Court's receiver appointed for the benefit of the respondent who could have got possession virtually at any time upon application to the Court since the receiver was for its benefit and was not a general chancery receiver.

During the proceedings one of the witnesses testified that the value of the leasehold estate to March 31, 1945, was $52,500. In awarding damages originally the Circuit Court terminated the damage period as of February 5, 1945, a date accepted by all parties as being correct. Therefore, there can be no doubt about this point being the terminal stage of the damage period. The Supreme Court reversed this judgment holding that the wrong measure of damages had been applied and directed further proceedings to be had. The Circuit Court referred the cause to a Special Master to take further testimony, but the plaintiff below declined to proceed with the Special Master, contending that the record contained sufficient evidence to warrant an award

of damages. The Master refused to follow this argument and held that there was no such evidence in the record. The Circuit Court confirmed the Master's report and held that the plaintiff was not entitled to any damages.

On appeal, without further hearing, the Supreme Court directed the entry of a judgment for $52,500. This amount represented an award for a period which extended for 54 days beyond the detention period, less accrued rent of $22,800.

It is obvious that the petitioner here has not had a full and fair opportunity to be heard on any phase of this matter, since the entry of the original judgment which was reversed by the Supreme Court of Florida. The Supreme Court's opinion is demonstrably inaccurate because the damages awarded are for a period during which the petitioner admittedly caused no damage; and the amount is not inconsiderable because it represents the time of greatest incomes of seasonal hotels on Miami Beach, namely, from the first part of February until the end of March.

As to judgment No. 2, for $6,855.52, the Court need seek no further to determine the illegality of this than the dissenting opinion of the Justice of the Supreme Court who wrote the two prior opinions. In the course of this dissenting opinion the learned Justice said:

> "The only item encompassed by our reversal order was the amount recoverable for the detention. The appellant is entitled to its day in court on the question of whether or not it should pay to the plaintiff-appellee the apportioned part of the $7,600.00 paid to the Receiver in 1944 prior to his discharge in 1945."

It is respectfuly submitted that the writ should be granted and the judgment of the Supreme Court of Florida quashed.

Respectfully submitted,

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Supreme Court of the United States

No. 378.

UNIVERSAL EQUIPMENT COMPANY, A DELAWARE CORPORATION, PETITIONER,

vs.

HARVEY CORPORATION, A FLORIDA CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO CERTIORARI.

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Supreme Court of the United States

No. 378.

UNIVERSAL EQUIPMENT COMPANY, A DELAWARE CORPORATION, PETITIONER,

VS.

HARVEY CORPORATION, A FLORIDA CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO CERTIORARI.

Universal Equipment Company, a Delaware corporation, as Petitioner, has filed its Petition for a writ of certiorari to the Supreme Court of Florida under Rule 37, United States Supreme Court Rules, and in the petition set forth certain arguments and contentions.

On behalf of Harvey Corporation, Respondent, we respectfully say that the petition is insufficient for the following reasons:

1. No substantial Federal question whatsoever is presented.

2. No Federal question was ever raised by the petitioner during any of the stages of the proceeding in the lower court and was only mentioned for the first time on a

Petition for Rehearing on the final decision of the Supreme Court of Florida.

Respondent's Statement of the Case.

The bill of complaint (Tr. 1) shows that the tenant was rightfully entitled to possession of a large hotel at Miami Beach, Florida, which had been temporarily placed under the control of the United States and wrongfully turned back to the lessor. In other words, when the Army gave up the occupation of the hotel it should have reverted immediately to the tenant, Harvey Corporation. Instead of that, by virtue of certain transactions mentioned in the bill of complaint, Universal Equipment Company, who was the assignee of the lessor (the assignment being taken during the period of government occupancy) not only acquired possession directly from the government but without the knowledge of the tenant acquired large sums of money, some $26,000.00 more or less, for restoration of the hotel, paid by the United States government, but which should have gone to the tenant. This took place in July of 1944.

The record shows (Tr. 1 to 14—the bill of complaint) and (Tr. 14 to 22—the answer) that the lessor claimed certain defaults in the lease making exorbitant demands upon the tenant.

The landlord refused to give up possession or to honor the lease retaining both the possession and the money paid by the United States government for restoration purposes. In addition thereto the landlord had obtained possession of the furniture belonging to the hotel which had been stored pending the Army occupation. Under these circumstances the lessee brought a bill in equity filed on October 5, 1944, and the lower court very promptly appointed a receiver

for the property, for the furniture which was in storage and for the money which the United States government had paid to the owner and which the owner was wrongfully withholding from the tenant. The petitioner in this case then appealed that order to the Supreme Court of Florida and the Supreme Court of Florida affirmed the action of the lower court in appointing a receiver. The record does not show that opinion but it is referred to at page 88 of the record. The receiver was still in possession of the property in the latter part of December, 1944, and was operating or attempting to operate the hotel. Reference to the decree of the lower court (Tr. 81) will show that both of the parties, plaintiff and defendant (petitioner and respondent herein), jointly agreed on or about December 30th that the receiver could lease the cigar counter concession to a third party for a year in advance, running from December 30, 1944, to December 30, 1945, with the understanding that the receiver could make the lease and the advance rentals would be prorated regardless of the outcome of the litigation. The lower court made this specific finding in its decree as shown aforesaid (Tr. 81).

It appears that on February 5th (Tr. 34) the Circuit Court of Dade County, Florida, entered a decree upholding the tenant's contention with reference to the lease and holding that the tenant held a valid lease and was entitled to possession. On that day the court ordered that the receiver turn over the possession of the hotel, together with furniture, fixtures and equipment, to the tenant and make the transfers. The court did not pass upon any question of damages but protected the receiver's operation for all rates fixed on receiver's occupation until the 10th day of February. In other words, on February 10th Harvey Corporation, the tenant, for the first time could operate its own leased hotel although it had been placed in technical

possession on February 5th. The court retained jurisdiction to settle other collateral matters including the question of damages (Tr. 36).

This case was then referred to the Master and he filed his report on June 6, 1945, and the Master recommended that the court award damages to the tenant in the following amounts of money:

> $10,050.00. This was contained in the original Master's report (Tr. 32) and an additional sum by way of damages in the amount of $7,590.38 (Tr. 42).

In addition thereto the Master pointed out (Tr. 42) that the receiver had retained $7,600, which had been collected for advance rental on December 30, 1944, and that the lessee should be given full credit for that rent paid in advance even though the receiver had remained in possession for about thirty-five days. In other words, the Master did not recommend any proration but that the tenant should have the full credit of $7,600 for the advance rental. This therefore left the damage item at a combination of the two figures, $10,050.00 and $7,590.38, making a total damage of $17,640.38, and the credit for the advance rental which had been entered into by stipulation of the parties of $7,600 (which sum was not in fact damages) and that made a total award of $25,240.12. (See the analysis by the Supreme Court of Florida in its first opinion, Tr. 55.) This amount was awarded by the lower court and covered in Paragraph 4 of the first decree on the 3rd day of October, 1945. That decree was not put in the record because a final decree on petition for rehearing was entered on May 10, 1946 (Tr. 43), and Paragraph 4 of the original decree was reinstated in full in that decree.

Therefore, when the lower court finally fixed the damages they were fixed at $17,640.38 for actual damages

suffered plus a credit of $7,600 which the receiver had collected for advance rentals by stipulation of the parties for the ensuing year and the proceeds of said sum having been turned over to the landlord. The court could just as easily have awarded damages in the amount of $17,640.38 and directed the receiver to turn over the advance rental to the tenant. However it seemed that the receiver had used some of those monies or had turned them over to the landlord and for that reason the credit was given for the advance rental to the tenant rather than the cash. That amount of money belonged to the tenant but it was not a disputed element of damage and no question was raised by either party with reference to that allowance.

The tenant, Harvey Corporation, appealed from so much of the decree as was involved in Paragraph 4 thereof concerning the award of damages, claiming that it was insufficient. The landlord, Universal Equipment Company, did not appeal and did not question the damage award nor particularly did it question the allowance of the credit for the advance rental of $7,600.

This court will note that the Supreme Court of Florida in its opinion of March 28, 1947 (Tr. 48), held that this amount of damage was wholly insufficient and sent the cause back to the lower court for the fixing and determining of an adequate damage allowance. Nowhere in the Assignments of Error or in the opinion of the court was there any question raised by Universal Equipment Company, the petitioner herein, with reference to the allocation of the $7,600 advance rental.

We mention this fact specifically because the petitioner now contends that it never had its day in court with reference to that item. Such is not the case.

When the mandate of the Supreme Court of Florida was filed in the lower court both of the parties petitioned

the lower court to fix and determine the damages under the opinion of the Supreme Court of Florida (Tr. 58) but instead of fixing the damages from the record already before the court, which was ample, the lower court, to wit, the Circuit Court of Dade County, Florida, referred the cause again to a Special Master. There was no additional testimony to be offered since it was all before the court and the respondents herein, Harvey Corporation, refused to take additional testimony and felt that the court should have determined the amount of damage from the record before it. The $7,600 item was not in dispute because it was admittedly advance rental and in the meanwhile that cash had been turned over by the receiver to the landlord and that sum in no way involved any question of monetary damage. It was simply a question of the wrong party having advance rental and instead of turning over the cash a credit had been given for it. The only question, therefore, left was whether the original damage award of $17,-640.38 was sufficient. The Master filed a report (Tr. 59) on February 17, 1948, in which he said that he could not make an award of damages, that he did not understand the Supreme Court's opinion and that he could not apply the formula fixed for the ascertainment of damages by the Supreme Court of Florida. He made no effort apparently. The lower court affirmed that Master's report and gave the tenant a decree which provided for no damages whatsoever and even failed to give the tenant credit for the advance rental of $7,600 which had been held by the receiver under a stipulation of the parties. We again mention this factor because petitioner says it did not have a day in court with reference to the $7,600 when it knew full well that there was never any question or dispute about that item and there was never an element of damage and that Universal Equipment Company was wrongfully holding the money.

This matter was then appealed again by the tenant, Harvey Corporation, to the Supreme Court of Florida and that court very promptly reviewed the matter and on September 23, 1949 (Tr. 63), reversed the Circuit Court of Dade County, Florida, and it held that there was ample evidence in the record to sustain a damage award in the amount of $52,500. That court said (Tr. 67):

> "It is our conclusion that the sum of $52,500.00 is the actual value of the leasehold for the detention period—less the rents reserved by the lease for the detention period in the sum of $22,800.00—leaving the amount sustained in damages (fol. 100) in the total sum of $29,700.00, which sum should bear interest at the rate of 6% per annum after February 5, 1945."

In the paragraph just prior to the one quoted (Tr. 67) the Supreme Court of Florida had recognized the distinction between the amount which had been previously allowed by the Master as damages in the amount of $17,640.38 and the amount of $7,600 as rental in advance on the cigar concession. That cigar concession money for rental paid in advance had never been treated as a part of the actual damage award because it was for rent a year in advance and only about thirty-five days of that year had been utilized for the detention period. No effort had been made in the previous opinions or before the Master by Universal Equipment Company, the petitioner, to receive any proration credit for the thirty-five days, that is to say, from December 30, 1944, to February 5, 1945, when the receiver actually surrendered possession of the premises to the tenant. In other words the $7,600 had been kept intact as a trust fund and the full credit for the same was passed over to the tenant because the cigar concession was to last through the ensuing season and part of the next year.

So this court will see that in the final opinion of the court the Supreme Court of Florida, as shown at Tr. 67,

specifically said that the $52,500.00, less $22,800.00, was the damage for the detention period. It did not overrule or include in that amount the $7,600 advance rental because that was clearly not for the detention period. On October 22, 1949 (Tr. 67), the petitioner, Universal Equipment Company, filed a petition for rehearing but there is no mention there of any Federal constitutional question or question of Federal jurisdiction raised. The whole question involved was whether there was sufficient evidence to sustain the amount of the award. The Supreme Court of Florida held that there was ample evidence and made the appropriate award based upon the evidence. In paragraph 10 of that petition for rehearing (Tr. 72) Universal Equipment Company, the petitioner, does not contend that it was deprived of a hearing but it said that it was deprived of the right to offer additional testimony.

When the lower court and the Supreme Court of Florida held that there was ample testimony submitted in the record for the Master and the lower court to have made a proper award of damages and that failing to do so the Supreme Court made its own determination certainly Universal Equipment Company could not contend, and cannot now contend, that it did not have a day in court. The refusal of the Supreme Court of Florida to give them the right to go back and re-litigate the case and re-open the case for the purpose of putting on additional testimony, is not depriving any litigant of his constitutional rights.

Based upon this final mandate of the Supreme Court, the rehearing having been denied in the Supreme Court of Florida (Tr. 73) the plaintiff, Harvey Corporation, the respondent herein, then filed its motion in the Circuit Court in and for Dade County, Florida, on January 9, 1950, asking that that court enter a final decree based upon the

mandate and the opinion of the Supreme Court of Florida dated the 23rd day of September, 1949. To this motion was attached a copy of the proposed decree. Notice of this motion and a copy of the decree, together with the statement of costs, was served upon the opposing counsel. This motion was filed, as we stated above, on January 9, 1950, and the order and decree on the mandate was not entered until March 23, 1950, or over two and one-half months.

We mention this because petitioner, Universal Equipment Company, says that it had no notice of the type of decree sought to be entered and finally entered by the lower court, that it had no right to be heard and was not given its day in court. Such a contention, in the face of the record (Tr. 73) is utterly without foundation. Nowhere in the record does it appear that Universal Equipment Company ever objected to the form or contents of the last decree, copy of which had been submitted to them and which had been left with the court for a period of two and one-half months. This decree (Tr. 76) contains a review of the entire proceedings and sets forth in detail how the original credits had been applied and how the entire leasehold had finally been consummated and settled all controversies between the parties. That decree provided (Tr. 80):

> "The original decree of this court as entered on the 10th day of May, 1946, in which the damage claims were allowed (fol. 112) and applied against the rent, charged the Plaintiff with rent from July 28, 1944, to February 5, 1945. The opinion of the Supreme Court has fixed the damage at $52,500.00 less the $22,800.00 which is ordered to be offset against the rent from July 28, 1944, to February 5, 1945. This court, by its order, had originally taken into consideration the $7,600.00 rental for the cigar concession which was paid in advance and agreed by the parties to be applied for the benefit of the Plaintiff upon retaking possession

and this was in the amount of $25,240.13 which had been allowed as a rent credit as against the $22,800.00 fixed by the Supreme Court as the allowance against the damage element alone, exclusive of the application of the $7,600.00 advance rental for the cigar concession, or a difference of $2,440.13."

The court then said:

"The rental payments under the entire lease have been paid or credited pursuant to the terms of the decree of the 10th day of May, 1946, which left on hand or in possession of the landlord the sum of $2,500.00 which, applied as a credit against the rental payments which had been previously credited of $25,240.13, would set off the differential of $2,440.13, leaving a credit due to the lessee of less than $60.00. This court, therefore, finds that the $22,800 rental credit allowed by the Supreme Court in its opinion of September 23, 1949, plus the $2,500.00 retained on hand by the Universal Equipment Company, set off the damage allowance and rental credits of $25,240.13 which had been allowed as the basis for the other payments and depreciations, under the original decree, leaving a balance upon which the Supreme Court ordered judgments to be entered in the amount of $29,700.00, plus interest at 6% from February 5, 1945.

"This leaves $7,600.00 which had been collected by the Receiver, with the consent of all parties, to apply as rental from approximately December 30, 1944, to December 30, 1945, with the understanding that the Receiver could make the lease and that the advance rentals would be prorated. In the original decree Harvey Corporation was given the benefit of the entire $7,600.00 for rental paid in advance (fol. 113) because possession was turned over to the lessee, the plaintiff, on February 5, 1945. Since the Supreme Court order allowed $22,800 as a credit on the rental from July 28, 1944, to February 5, 1945, and there was $2,500.00 left on deposit as an advance payment on security which more than offset the original $25,240.13

rental setoff, no part of the $7,600.00 advance cigar concession rentals has been applied or considered. Actually the rental of $7,600.00 under this basis should be prorated because the Plaintiff did not take possession until February 5th, or 36 days after the rental concession for one year commenced. The prorata amount is $20.82 per day, or an allowance of $749.52 for the 36-day period prorated or utilized rent of the $7,600.00 yearly period not enjoyed by the Plaintiff after February 5th, leaving a balance of $6,850.48 of the $7,600.00 which was due as a credit and should have been turned over to the Plaintiff as of February 5, 1945, and which said sum under the original additional decree in this cause was kept and retained by the Receiver or the Universal Equipment Company as a rental payment.

4. Because of the difference in the rent application this court is therefore entering two judgments pursuant to the mandate and order of the Supreme Court as follows:

a. A Judgment in favor of Harvey Corporation against Universal Equipment Company is hereby entered in the sum of $29,600, plus interest from February 5, 1945, at the rate of 6%, which together makes a total sum of $38,716.80 for which judgment is hereby entered and for which let execution issue.

b. A judgment in favor of Harvey Corporation against Universal Equipment Company is hereby entered in the sum of $6,855.52, plus interest from February 5, 1945, in the total amount of $8,967.02 for which sum let execution issue."

When this decree was entered then for the first time Universal Equipment Company, the petitioner herein, took an appeal to the Supreme Court of Florida. The previous appeals had been taken by the tenant, Harvey Corporation. This court will note that up until this time there was no Federal question involved, no Federal question had ever

been raised, there was no statute or constitutional provision of the State of Florida or the United States involved and it was only a question of the Supreme Court of Florida fixing the amount of damages from the testimony produced before the court. This testimony is not made a part of the record in this cause and there is no way by which this court, even if it was inclined so to do, could pass upon the sufficiency of that evidence. It will therefore have to be assumed that the Supreme Court of Florida found ample evidence in the record, as produced in the lower court, to sustain its finding of damages.

There are no Assignments of Error shown in the record but there was no specific question raised in those Assignments of Error concerning any question of Federal jurisdiction and Federal questions or constitutional points. The petitioner, in his petition for writ of certiorari, simply contends on page 2 of said petition that the Federal questions were first raised by the appeal to the Supreme Court of Florida from the above decree and by the Assignments of Error which challenge the correctness of the decree. Simply by challenging the correctness of the decree of a Circuit Court it did not raise Federal questions sufficient for this court to grant a review by certiorari.

With this statement of the case before the court we think it is obvious that the petition for certiorari should be denied.

However, we will specifically answer certain questions as proposed in the petitioner's brief. On page 2 it contends that Federal questions had been raised and passed upon by the Supreme Court of Florida. This is not so as appears from the record. The petitioner then presents two questions:

a. It contends that the judgment was entered by a state court without notice or without an opportunity to be

heard. The record in this case shows that this litigation has been pending since October, 1944, and was not finally disposed of until July 11, 1951, when the Supreme Court of Florida entered its order denying the petition for rehearing. During that time the petitioner was before the court many times. A judgment entered pursuant to a direct mandate of the Supreme Court of Florida does not call for a complete rehearing of the case by the losing party. When a judgment is so entered it does not amount to depriving a party of due process and there is no showing in the petition or the record to justify such a finding.

b. Petitioner then raised a second question. It contends that this case was arbitrarily and capriciously decided. We assume that any party losing a law suit feels that the court has arbitrarily and capriciously decided the case against him. After virtually seven years of litigation it seems rather unusual that counsel for the petitioner would say that this case was arbitrarily or capriciously decided. A casual inspection of the record will show that there is no foundation to that question.

Specifications of Error to Be Urged.

Counsel contends that the Supreme Court of Florida granted to the tenant damages beyond the date of detention. That is not so because the Supreme Court's opinion itself fixed damages up to the date of detention, February 5, 1945, less the rents reserved by a lease for the detention period in the sum of $22,800.00 (Tr. 67). The question of the $7,600 application for rent credits paid in advance was not damages for the detention period but was a stipulated amount which should have been paid over to the tenant but which was paid previously by order of the court from the receiver to the landlord and advance credit given on the rent. This was not damages beyond the detention

period but an agreed sum held in trust which should have been turned over by the landlord to the tenant. The lower court in the final decree, as we have above mentioned, covered specifically all of the applications and there is no basis for the petitioner's contention that the additional judgment of $6,855.52, plus interest as shown at Tr. 82, was entered without a trial. This was the original $7,600 but the lower court refused to give us the $7,600 plus interest as had been given in its previous opinion but insisted upon prorating that $7,600 by taking off thirty-five days' proration. We could not actually object to that although the money should have been paid to the tenant on December 30th when it was first received by the receiver. The receiver and/or the landlord had that $7,600 at all times. However, it did not take any cross-assignments of error even though that judgment was about $800 less than it should have been. Certainly the petitioner cannot complain because the lower court gave it a proration and a credit of about $800 which it had not even asked for or contended for at any previous time of the proceedings.

About the only thing that counsel for the petitioner relies upon is the one dissenting opinion from a member of the Supreme Court of Florida as shown on page 88 of the transcript. Six members of the Supreme Court fully understood that the item of $7,600 had been previously considered and was made a part of the award to the tenant by the Master in his first report and by the lower court and was specifically contained in paragraph 4 of the decree which was appealed from in the first instance. The petitioner, being the appellee at that time, filed no cross-assignments of error and never objected to the $7,600 credit for advance rental being given to the tenant. It had the money which had been received through the receiver and turned over to it. Surely that money belonged to the ten-

ant and six members of the Supreme Court, out of the seven, fully understood that position. Apparently the Honorable Roy Chapman, who dissented only on that one point, had overlooked the fact that the original decrees of the court had incorporated portions of the Master's report concerning that $7,600 and that the lower court had found, as a matter of fact, in all of its decrees, including the last one appealed from (Tr. 81 and 82) that the parties had stipulated with reference to that $7,600. In other words the parties had agreed that notwithstanding their disputes that the receiver could rent the cigar concession for $7,600 for a year in advance and that that lease would be recognized by whoever won the case and that credit by proration would be given. That point was fully and definitely settled by the lower court and it does not appear from the record that in the assignments of error any question was ever raised on that point. Judge Chapman (Tr. 90) in his dissenting opinion said that the receiver's report had not been sent to the Supreme Court. The receiver's report, which covered the $7,600 item and the stipulation of the parties was before the Master and he recognized that report and the stipulation and covered that in his final report to the court. The court itself, without any opposition or objection by the Universal Equipment Company, allowed the $7,600 in full without taking a thirty-five day proration from December 30, 1944, to February 5, 1945. No cross-assignments of error or cross-appeal was taken by Universal Equipment Company. It was satisfied with the $17,640.38 damage award and the credit in full for $7,600 advance rental. It made no effort to upset that. Naturally it would be satisfied. That decree was not disturbed with reference to the $7,600 item and in all of the subsequent appeals that question was never even brought up for discussion. The findings of the lower court, as contained in the decree, are assumed to be correct, at

least from a factual viewpoint unless the party challenging those facts brings up the record to dispute those findings.

When the attorneys for the appellant, petitioner herein, Universal Equipment Company, sought to review the final decree of the lower court entered on March 23, 1950 (Tr. 76), they did not question the validity of the judgment concerning the $6,855.52. No separate assignment of error appears in the record on that point. For the first time the appellant, Universal Equipment Company, petitioner herein, on May 30, 1951, in its petition for rehearing, contended that the judgment and the decree of the court was entered without notice of hearing or opportunity to defend (Tr. 96).

The mandate of the Supreme Court definitely ordered a specific amount to be entered for damages for the detention period. A motion for an order on that mandate was made and served upon opposing counsel and a copy of the proposed decree was served upon them as we have heretofore stated. There was nothing else to be heard. The amount of damages, based upon $29,600 plus interest from February 5, 1945, was the damage amount that was entered under the mandate. That left other matters for settlement which were not in dispute, namely, the application of some $2,500 which was held by the landlord as a deposit, and secondly the $7,600 item which was held in trust for advance rental. Universal Equipment Company had not complained about the application of the deposits held by the landlord and made no objection to the treatment made of those items by the lower court. As a matter of fact it never made any objection to the application of the $7,600 advance rental but when, in accordance with the final disposition of the case the court reduced that amount of $7,600 by giving a tihirty-five day proration which Universal Equipment Company had not even asked

for and reduced that judgment to $6,855.52 plus interest, counsel for the Universal Equipment Company now contends that that judgment was entered without notice to them. The Supreme Court of Florida did not agree and denied the petition for rehearing under date of July 11, 1951 (Tr. 97).

The Law.

> "In reviewing judgment of state court, United States Supreme Court will not pass on any federal question not shown by record to have been raised in state court or considered there, whether it be one arising under a different or the same clause in Constitution with respect to which other questions are properly presented." See *People of State of New York ex rel. Cohn* v. *Graves,* 57 S. Ct. 466, 300 U. S. 308, 81 L. Ed. 666.
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> "Conflicts in testimony and in its interpretation were for Illinois courts and not the United States Supreme Court, and that court could not substitute its judgment for that of the state courts in that respect." See *Milk Wagon Drivers Union of Chicago, Local 753,* v. *Meadowmoor Dairies,* 61 S. Ct. 552, 312 U. S. 287, 85 L. Ed. 836, 132 A. L. R. 1200.

We, therefore, respectfully contend that the petition for writ of certiorari should be denied.

Respectfully submitted,

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